95-1702

NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

THE VILLAGE OF SUN,
Petitioner,

v.

WALLACE RAY RITTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Gerald J. Nielsen
Counsel of Record

Gerald J. Nielsen
Law Offices of Gerald J. Nielsen
131 Airline Highway, Suite 201
Metairie, Louisiana 70001
(504) 837-2500
Counsel for Petitioner

October 1995

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

39pp

QUESTIONS PRESENTED

Whether 42 U.S.C. 1983 applies to all municipalities, regardless of size, and regardless of whether the imposition of liability would extinguish the village as a viable governmental unit and halt its operations.

Whether the Eleventh Amendment to the United States Constitution immunizes tiny village or township governments from actions brought under 42 U.S.C. 1983, where liability would shut down the village or township and require the state to rescue the municipality or assume responsibility for providing local governmental services.

PARTIES TO THE PROCEEDING

The Village of Sun, Petitioner, and defendant in the court of first instance.

Wallace Ray Ritter, Respondent and plaintiff in the court of first instance.

Roger Smith, defendant in the court of first instance.

Ricky Hawthorne, defendant in the court of first instance.

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OCTOBER TERM, 1995

THE VILLAGE OF SUN,

Petitioner,

v.

WALLACE RAY RITTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Village of Sun respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra.* XXX) is unreported. The opinion of the district court (App., *infra* XXX) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 15, 1996 (App. *infra,* XXX). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Eleventh Amendment to the United States Constitution reads as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT

This case is about whether Wallace Ray Ritter may pursue in a federal court, a civil rights action for money damages which, if successful, would wipe the Village of Sun off the map.

Respondent Ritter sued the Village of Sun, Ricky Hawthorne and Chief of Police Roger Smith in July of 1994, claiming that Ritter was beaten by Hawthorne while Smith simply stood by and watched. The suit assserts a violation of

the Fourth Amendment, and is brought on authority of 42 USC § 1983. The village filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Petitioner contended, among other things, that the district court lacked jurisdiction over the Village of Sun pursuant to the Eleventh Amendment, and argued that a municipality as small and financially tenuous as the Village of Sun was not contemplated to lie within the reach of municipal liability approved by this Court in *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978). The district court held that the Village of Sun was not immune from suit under either the Eleventh Amendment or the interpretation accorded 42 U.S.C. 1983 by this Court in *Monell*. In a five-sentence *per curiam* opinion, the court of appeals affirmed the district court.

A. Characteristics of the Village of Sun.

This case involves construction of 42 U.S.C. 1983 in light of the Eleventh Amendment and this Court's landmark ruling in *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978). This case also turns upon the defining characteristics of the Village of Sun: its minute size and paltry capital assets. In essence, petitioner argues that Sun is too small to weather civil rights litigation of the magnitude at issue in this case, and that this Court expressly acknowledged such limits on municipal liability in the last sentence of footnote 54 of its decision in *Monell*. In addition, petitioner argues that it is shielded from suit by the Eleventh Amendment because the imposition of financial liability upon Sun would effectively shut the village down and require the state to come to the town's rescue. Louisiana would have to bail out the village or assume responsibility for providing

municipal services to Sun's denizens. Either way, an impact upon the state must necessarily result.

The Village of Sun has 471 residents served by a grand total of five officials and employees. Sun's government consists of an elected mayor, three elected council members, an appointed town clerk, and an appointed chief of police. The police chief doubles as the village's head maintenance man. It is likely that this court has never received a petition for certiorari from a municipality this small.

The job of mayor is a part-time, unpaid position. Sun's mayor has held this post without pay for the last 17 years. Council members attend one meeting per month, each time receiving compensation of $20.00. The town clerk's job is a part-time position paying $6.00 an hour. The multifaceted position of police chief and maintenance supervisor commands a salary of $1,200.00 per month,, with half of this money coming from the village's general appropriations and half taken out of the waterworks account.

Sun lays claim to three assets. There is Sun's Town Hall, which was donated with the understanding that the building would revert to the donor's heirs should it ever be used for any other purpose. Originally constructed as a "skating rink," the building houses the state created "Mayor's Court," responsible for trying violations of village ordinances, and is the home base for Sun's administrative, executive and legislative functions. There is a water system, in which the village enjoys only a partial ownership interest. Then there is the village's senior citizen's center, purchased recently for $25,000.00.

Under Louisiana law, Sun is officially a "village," since

it has fewer than 1,000 inhabitants. L.S.A.-R.S. 33:322. It is too small to count as a 'town," let alone a "city," under Louisiana law. Because of its minute size, Sun is subject to certain statutory constraints imposed by state law.

In fact, Sun is a specific statutory animal called a "Lawrason Act" municipality. L.S.A.-R.S. 33:1 et seg.. Under this state statute, the village's powers are very limited and the duties of its officials carefully defined. Among other things, Sun is restricted regarding the extent to which it may *go into debt,* and the village must secure state approval to issue bonds.

Executing a substantial civil rights judgment against a municipality this modest would mean selling Town Hall - if Sun had the liberty to do so. One question then is whether this Court's decision in *Monell,* overruling the ban on civil rights municipal liability announced by *Monroe v. Pape.* 81 S.Ct. 473 (1961), really meant to lay the groundwork for the financial ruin of small town — *really* small town — America. The other issue is whether the Eleventh Amendment bars Section 1983 litigation against municipalities too small to bear the liability, forcing the state to rescue the town financially or to step in to provide discontinued services.

B. Procedings Below

The Village of Sun filed a Motion to Dismiss Motion for Summary Judgment. In its Order and Reasons of June 16, 1995, the district court declared that Sun could not be considered an "arm of the state" for purposes of imposing Eleventh Amendment immunity. Sun's small size did not remove the village from *Monell's* ambit, the court concluded.

The trial court distinguished the ruling of the Ninth Circuit U.S. Court of Appeals in *Mitchell v. Los Angeles Community college Dist.*, 861 F.2d 198 (9th Cir. 1988), which held that a California community college district was a state entity and enjoyed Eleventh Amendment immunity from various civil rights claims. *Mitchell* was inapplicable because it dealt with whether a "governmental entity," as opposed to a municipal corporation, is an arm of the state, the court explained. Deciding to analyze the situation of Sun in light of the *Mitchell* factors anyway, the court declared that it was "mere conjecture[1] on Sun's part to assume that should a judgment be rendered against it in an amount exceeding its financial ability to pay the state would be forced to pay the judgment." The court also averred that *Monell* is limited only to municipal corporations.

The jurisdiction of the district court, the court of first instance, was predicated upon 28 U.S.C. 1331. Jurisdiction of the court of appeals was predicated upon 28 U.S.C. 1291 and under the collateral order doctrine, as permitted by this Court's ruling in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.* 113 S.Ct. 684 (1993). That decision allows states and state entities claiming to be "arms of the state" to appeal a district court order that rejects an Eleventh Amendment immunity claim.

The court of appeals disposed of the village's arguments with a single-paragraph decision. Rejecting the argument that Sun is an arm of the state for Eleventh Amendment pur-

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[1] In refusing to grapple with what it dismissed as "conjecture," the district court directly disobeyed this court's clear command in *Puerto Rico Aqueduct*, that analysis of claims of immunity premised upon the Eleventh Amendment be decided as early as possible in the progress of the case. *Puerto Rico Aqueduct, infra*, 113 S.Ct. at 689.

poses, the court of appeals affirmed the decision below. Petitioners now come before this Honorable Court to request respectfully that the court of appeals be reversed. Sun *is not*, within the meaning of footnote 54 in *Monell*, one of those "local governmental units which are not considered part of the state for Eleventh Amendment purposes."

REASONS FOR GRANTING THE PETITION

The court of appeals' decision to ratify the reasoning of the district court now creates a conflict between the Ninth and Fifth circuits regarding the standards that govern when a local governmental entity will merit Eleventh Amendment protection. The Ninth Circuit's decision in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir 1988), coupled with that court's more recent ruling in *Alaska Cargo Transport v. Alaska Railroad Corporation*, 5 F.3d 378 (9th Cir. 1993), adopt a clashing and more generous view of when a governmental entity — whether local or not — will be considered an arm of the state. Given the relentless onslaught of civil rights litigation, this case presents seminal questions of municipal liability that could affect the financial integrity of towns and cities of every dimension. Critical issues of statutory and constitutional interpretation debated in this case have yet to be passed on by this Court. Finally, the position adopted by the court of appeals below runs afoul of the rulings of this Court on an important question of federal law: is there any limit regarding which municipal governments may be subjected to civil rights monetary liability, even at the price of extinction?

1. **The Fifth Circuit U.S. Court of Appeals Decided an Important Question of Federal Law that Should be Resolved by this Court: moreover, the Fifth Circuit's ruling conflicts with the case law of this Court.**

This case hinges upon what this Court meant when it inserted footnote 54 into its *Monell* decision. That note reads in relevant part:

> There is certainly no constitutional impediment to municipal liability....Nor is there any basis for concluding that the Eleventh Amendment is a bar to municipal liability. [citations omitted] **"Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."**

Monell v. Department of Social Services of the City of New York. 98 S.Ct. at 1035 (note 54. emphasis added). According to the Fifth Circuit in Wallace Ray Ritter's suit, a municipal corporation can *never* be an "arm of the state," therefore *never* qualify as a *"local* governmental unit" within the meaning of footnote 54. What the Fifth Circuit ignored, however, was that this court has always been careful to refrain from saying that *Monell* applies to "all" municipalities of every size and description. *See, Quern v. Jordan,* 99 S.Ct. 1139, 1144 (1979)(reiterating the text of footnote 54 of *Monell).*

It is not as if municipalities have always been exposed to the full measure of civil rights liability. The exact opposite was true for the 17 years extending from this Court's 1961

ruling in *Monroe v. Pape* until its 1978 ruling in *Monell*. During that interval, cities, towns and the like enjoyed absolute immunity from suit under 42 U.S.C. 1983.

Now it is *Monell* that has passed the seventeen-year mark, with this Court having since declared that municipal liability is not without its limits. This Court has never declared that *Monell* extends to every municipality. Even where this Court has imposed municipal liability, it has confined it within strict parameters.

One decision confining municipal liability is *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981), where this Court held that punitive damages are not available against municipal defendants in section 1983 litigation. The ruling was impelled by a concern for the financial strain such awards would impose on local governments. Tracing the lineage of relevant cases, the court declared:

> In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised.

City of Newport v. Fact Concerts, Inc., 101 S.Ct. at 2757.

As a matter of public policy and as a matter of law, this Court decided that punitive damages for municipal civil rights defendants is a bad idea:

> Finally, although the benefits associated with awarding punitive damages against

> municipalities under [section] 1983 are of doubtful character, the costs may be very real. In light of the Court's decision last term in *Maine v. Thiboutot*, 448 U.S. 1.100 S.Ct. 2502.65 L.Ed.2d 555 (1980), the [section] 1983 damages remedy may now be available for violations of federal statutory as well as constitutional law. [citation omitted] Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assume compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. **To add the burden of exposure for the malicious conduct of individual governmental employees may create a serious risk to the financial integrity of these governmental entities.**

City of Newport v. Fact Concerts, Inc., 101 S.Ct. at 2761 (emphasis added). The court also pointed out other avenues of monetary compensation for plaintiffs: "allowing juries and courts to assess punitive damages against the offending official, based on his personal financial resources." *Id.* This undercuts respondent's anticipated argument that Eleventh Amendment immunity for Sun would leave Wallace Ray Ritter without any federal remedy. He has plenty of remedies — against the individuals alleged to have trampled his constitutional rights, rather than against the village where they dwell. (Moreover, claims for injunctive and/or declaratory relief against small entities such as Sun would be unaffected.)

There is ancient support for the notion that the law should refrain from imposing bank-busting liability upon local governments. These sentiments were expressed by members of Congress when they tossed out the Sherman Amendment, which would have held towns financially liable

for injuries to those caught up in public riots. The current Chief Justice of this Court latched onto this theme in his dissent from the majority in *Monell*, quoting the sentiments of one representative as follows:

> Suppose a judgment obtained under this section, and no property can be found to levy upon except the courthouse, **can we levy on the courthouse and sell it?** So this section provides, and that too in an action of tort, in an action *ex delicto*, where the county has never entered into any contract, where the State has never authorized the county to assume any liability of the sort or imposed any liability upon it. **It is in my opinion absurd.**

Monell v. Department of Social Services of the City of New York, 98 S.Ct. at 2052 (Justice Rehnquist, dissenting, emphasis added). Sun's "skating rink" *is* its courthouse! The *exact* event which the current Chief Justice suggested was an absurdity in *Monel*, now presents itself as reality in the matter at bar.

The current Chief Justice reiterated this view in his dissent from the Court's decision in *Owen v. City of Independence, MO.*, 100 S.Ct. 1398 (1980), which declined to extend the protecton afforded by qualified immunity to municipalities. "After today's decision, municipalities will have gone in two short years from absolute immunity under [section] 1983 to strict liability." *Owen v. City of Independence, MO.*, 100 S.Ct. at 1422. Such a development would have an adverse effect on the critical relationship between the states and the federal government, he noted: "*The*

court's decision also impinges seriously on the prerogatives of municipal entities created and primarily regulated by the states." Id., at 1423 (emphasis added).

Justice Rehnquist warned that the trend begun by *Owen* could lead to the very perils that prompted legislators in 1871 to ditch the Sherman Amendment:

> First several legislators expressed trepidation that the proposal's strict liability approach could bankrupt local governments. They warned that liability under the proposal could bring municipalities 'to a dead stop.' [citations omitted] Representative Bingham argued that municipal liability might be so great under the measure as to deprive a community 'of the means of administering justice.'

Id. at 1426. Here, unbridled extension of *Monell* liability to the Village of Sun will bring this tiny village to a "dead stop," if the plaintiff's suit is even moderately successful. The village's "means of administering justice" will be literally, gone. Neither section 1983 nor *Monell* condones this result. The current Chief Justice has consistently opposed unwarranted expansion of municipal liability under 42 U.S.C. 1983, especially in the post-*Monell* era.[2]

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[2] This position is revealed by the Chief Justice's posture in a number of high court cases: *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978)(dissenting view); *Owen v. City of Independence, MO.*, 100 S.Ct. 1398 (1980)(dissents from denial of qualified immunity to municipalities); *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981)(supports excluding municipalities from punitive damages liability); *Brandon v. Holt*, 105 S.Ct. 873 (1985)(dissents from holding a municipality financially liable for constitutional violations when only a

The precept that government must be preserved — even at the expense of limiting redress for injustices — has even more ancient roots. An English court in 1765 underscored this theme at the close of an historic opinion striking down a search and seizure as illegal. "[B]ut tyranny is better than anarchy, and the worst Government is better than none at all." *Entick v. Carrington,* 19 How. St. Tr. 1029,95 Eng. Rep. 807 (K.B. 1765). This very Court has looked to *Entick* when evaluating a Fourth Amendment excessive force claim, declaring the decision to be "a monument to English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law.' *Boyd, supra* at 626,6 S.Ct., at 530 (discussing *Entick v. Carrington,* [citation omitted])." *Brower v. County of Inyo,* 109 S.Ct. 1378, 1381 (1989).

Resolving the immunity issue in this case entails striking a balance between the interests of the individual and those of the society at large. This court has performed exactly that type of balancing act many times before specifically in the context of Fourth Amendment claims. In *Tennessee v. Garner,* 105 S.Ct. 1694 (1985), the Court described "the balancing of competing interests' to be 'the key principle of the Fourth Amendment.' [citations omitted]" *Id,* at 1699. Two years later, *Anderson v. Creighton,* 107 S.Ct. 3034 (1987), drove home the same point:

(footnote 2 continued)
public official has actually been named as a defendant); *City of Oklahoma City v. Tuttle,* 105 S.Ct. 2427 (1985) (writing opinion declaring that existence of an unconstitutional municipal policy generally cannot be inferred from a single incident); *Pembaur v. City of Cincinatti,* 106 S.Ct. 1292, 1310 (1986)(dissent from decision expanding *Monell* for municipalities, saying that the ruling "unfairly increases the risk of liability on the level of government least able to bear it.").

> The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable.

Id. at 3041.

The very balance between government and the individual is at stake here. Said cherished balance will cease to exist, petitioner avers, if Sun and tiny municipalities like it across America should be obliterated by imposition of *Monell* liability. The result: encroaching anarchy like that decried by Lord Camden in *Entick*.

II. The Court of Appeal's Interpretation of the Extension of Eleventh Amendment Immunity to an "Arm of the State" Clashes with Decisions of the Ninth Circuit U.S. Court of Appeals.

As mentioned earlier, the Fifth Circuit does not believe that any municipal corporation can *ever* be an "arm of the state," and hence *ever* qualify as a "*local* governmental unit" within the meaning of footnote 54 of *Monell*. The Ninth Circuit, in contrast, adopted a practical test for ascertaining which local governmental entities qualify as an arm of the state for Eleventh Amendment purposes in *Mitchell v. Los Angeles Community College Dist.* 861 F.2d 198 (9th Cir. 1988). The *Mitchell* decision established five factors used to analyze the issue. The first element of the test demands an examination of "whether a money judgment would be satisfied out

of state funds...." *Mitchell v. Los Angeles Community College Dist.* 861 F.2d at 201.

Whether or not a judgment "would impact" the state treasury was declared "[t]he most critical" factor of the *Mitchell* analysis when it was revisited by the Ninth Circuit in *Alaska Cargo Transport v. Alaska Railroad Corporation,* 5 F.3d at 380. There the Ninth Circuit held that a regional railway corporation was an arm of the state for Eleventh Amendment purposes. A practical approach to the Eleventh Amendment held sway, with the court commenting:

> We agree with the district court that, 'if faced with a large money judgment,' ARRC would be compelled to turn to legislative appropriation in order to remain in business, and the legislature would have to respond favorably so that the 'essential transportation function would continue to be performed and to protect the state's very substantial investment in the Alaska Railroad.

Alaska Cargo Transport v. Alaska Railroad Corporation, 5 F.3d at 381. The holding of the court in *Alaska Cargo* is as follows:

> On balance,[3] we conclude that ARRC [the defendant] is entitled to Eleventh Amendment immunity. We are persuaded that a money judg-

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[3] Respect for this court's balencing of interests test is apparent.

> ment against ARRC likely[4] would impact Alaska's treasury because of the state's strong interest in keeping ARRC operationally and fiscally sound. We affirm the district court's determination that "ARRC is an alter ego of the State of Alaska and ... immune from suit in federal court." (citation omitted). (emphasis added)

Alaska Cargo Transport v. Alaska Railroad Corporation, 5 F.3d at 382.

Sun, like the Alaska Railroad, would have no choice but to shut down should it incur substantial liability. The village lacks sufficient assets to satisfy even one modest judgment measured by current standards. Even if the state would not directly incur Sun's indebtedness, it would "likely" have no choice but to step in, either to prop up the village or to assume the activities that Sun would have to abandon in bankruptcy. Unmoved by the realities of the situation before it, the court of appeals looked only to the paper reality of Sun's status as a Louisiana municipal corporation when evaluating the village's susceptibiltiy to *Monell* Liability.

The Fifth Circuit U.S. Court of Appeal's opinion does not reveal that it engaged in any step-by-step analysis to decide what relationship actually exists between Sun and the state. Nor would such analysis pose an onerous burden upon either the district court or the court of appeals. Federal courts have developed standards, for example, in order to analyze claims of qualified immunity raised early in litigation.

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[4] Please compare the Ninth Circuit's use of the word "likely," to the refusal of the district court below to grapple with the issues presented to it as "conjecture" to this court's command at page 689 of *Puerto Rico Aqueduct*.

Respondent is expected to claim that petitioner's approach would require courts to engage in a vague fiscal analysis of the respective positions of the parties. Yet this is exactly what federal courts do all the time when assessing whether a particular suit invoking a district court's diversity jurisdiction satisfies statutory monetary requirements. Further, this court has held that such analysis *must* be conducted at the commencement of a lawsuit when a legitimate Eleventh Amendment issue is raised. *Puerto Rico Aqueduct & Sewer Authority* supra.

Instead of engaging in any detailed analysis, the court of appeals looked only to the facial characteristics of the Village of Sun. Then the court of appeals decided that the village's status as a municipal corporation warranted its exclusion from Eleventh Amendment protection, regardless of its actual circumstances. This approach conflicts with the views of the Ninth Circuit, and it conflicts with *Monell, Quern* and *Puerto Rico Aqueduct.*

In sum, the Fifth Circuit Court of Appeals adopted an overly broad view of *Monell*, and an overly narrow interpretation of the Eleventh Amendment, in derogation of the jurisprudence of this Court. Whether *Monell* permits minute villages and towns throughout America to be obliterated by federal civil rights judgments is a question of importance that merits the consideration of this Court. Should Sun fall, the state will be left to pick up the tab in one form or another, a result contrary to *Monell* and the spirit of the Eleventh Amendment. There are thousands of Suns in America, each of which could encounter this same threat someday.

CONCLUSION

This Court's municipal liability decisions have largely focused upon the Gothams of America, mega cities like *Monroe*'s Chicago and *Monell*'s New York. Municipalities on this scale can certainly absorb a typical civil rights judgment without shutting down.

This case is different. If Sun loses this case, Louisiana loses Sun.

Lord Camden, who penned *Entick* in 1765, closed his famous decision by warning against the perils of anarchy. His decision, which was the inspiration for the Fourth and Fifth Amendments to the United States Constitution, stresses the pressing need to preserve governmental integrity and authority. Two hundred years later, this case requires this Court to decide whether a single civil rights litigant may wipe out an entire town. If the Fourth Amendment indeed represents a balance between the interests of the individual and those of government, then this Court should allow Sun to invoke the Eleventh Amendment to keep the system in equilibrium.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gerald J. Nielsen
Counsel of Record
Law Office of Gerald J. Nielsen
131 Airline Highway, Suite 201
Metairie, Louisiana 70001
(504) 837-2500
Counsel for petitioner

OCTOBER TERM 1995

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-30672
Summary Calendar

FILED
JAN 15 1996

Wallace Ray Ritter,

Plaintiff-Appellee

versus

Ricky Hawthorne; Roger Smith,

Defendants,

and

The Village of Sun,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

(CA-94-2249-E)

Before KING, SMITH and BENAVIDES, Circuit Judges.

Per Curiam:*

The Village of Sun, Louisiana, appeals from a denial of summary judgment. Sun contends that it is protected from suit by the Eleventh amendment of the United States Constitution. We have reviewed the record and the district court's order and find no reversible error. Sun is a municipal corporation in Louisiana, is not an "arm of the state," and is not entitled to the immunity afforded the State of Louisiana under the Eleventh Amendment. Accordingly, we affirm for essentially the reasons given by the district court.

AFFIRMED.

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* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Jun 16 '95

WALLACE RAY RITTER	CIVIL ACTION
versus	NO. 904-2249
RICKY HAWTHORNE, et al	SECTION: E/1

ORDER AND REASONS

Defendants, the Village of Sun ("Sun") and Roger Smith ("Smith") have filed a motion to dismiss and/or for summary judgment, seeking to have all claims asserted by plaintiff against them dismissed. Plaintiff Wallace Ray Ritter ("Ritter") opposes this motion.

Plaintiff Ritter contends that on October 13, 1993, he went to the home of David Wells, which is located in Sun, Louisiana. Defendant Ricky Hawthorne ("Hawthorne") arrived at Wells' home after he did. Ritter approached Hawthorne to discuss a rifle which Ritter believed Hawthorne had seized from his brother. Hawthorne advised that it was Smith, Sun's Chief of Police, who had seized the rifle. Ritter began walking toward Smith's patrol car. Hawthorne alerted Chief Smith by radio that Ritter was approaching. Ritter then claims that Hawthorne began beating him and kicking him from behind in an unprovoked attack. Ritter is not a

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paid police or municipal officer, but is a friend of Chief Smith. Plaintiff claims he is a "volunteer" police officer, who frequently assists Chief Smith in police matters. Chief Smith did not atempt to stop the attack and did not arrest Hawthorne. Ritter suffered a concussion and other injuries. He sued the Village of Sun, Chief Roger Smith and Ricky Hawthorne for a violation of his civil rights, seeking compensatory and punitive damages and attorney's fees under 42 U.S.C. § 1983 and § 1988.

Sun argues that the Eleventh Amendment to the United States Constitution bars this Court from exercising jurisdiction over it, an arm of the state. It further argues that summary judgment should be entered in its favor because plaintiff has not demonstrated there is evidence which would support a finding that Sun's employee or employees violated his constitutional rights. Similarly, Roger Smith argues that he is entitled to summary judgment because plaintiff has not adduced sufficient evidence, disputed or otherwise, which would establish that he violated plaintiff's constitutional rights, and that further, he is entitled to qualified immunity. Plaintiff opposes these motions.

The first issue to be addressed is whether Sun is considered a municipality or a local government unit which is an arm of the state for purposes of the immunity afforded by the Eleventh Amendment to the state in civil rights actions under 42 U.S.C. § 1983. Guidance is provided by the Louisiana statutes defining what municipalities are. Louisiana Revised Statutes LSA-R.S. 33:101 and 33:130.51 define a municipality as "an incorported city, town, or village." LSA-R.S. 33:1 provides that "[r]esidents of any unincorporated area with a population in excess of three hundred

inhabitants may propose the incorporation of the area," and, upon a determination by the Governor that the petition for incorporation meets the criteria specified in the statute, shall call an election of the inhabitants and upon majority vote of the inhabitants, the area shall be incorporated. LSA-R.S. 33:3. A municipality is authorized by law "to exercise any power and perform any function necessary, requisite, or proper for the management of its affairs not denied by law", which specifically includes the power to levy and collect taxes." LSA-R.S. 33:361.

LSA-R.S. 33:341 provides:

> Municipal corporations shall be divided into three classes: cities, towns, and villages. Those having five hundred inhabitants or more are cities; those having less than five thousand but more than one thousand inhabitants are towns; and those having one thousand or fewer inhabitants are villages.

Nathan Wood, the elected mayor of Sun, described Sun as follows in his affidavit attached to the defendants' motion:

> [T]he Village of Sun has a population of only 471 persons. . . .[T]he Village of Sun has no officials or employees other than the following: an elected mayor, three elected council members, an appointed town clerk, and an appointed chief of police who also is responsible for all maintenance responsibilities of the Village. . . .
>
> [T]he mayor is a part-time unpaid position, that

> the three council positions involve only one meeting per month for which each council member is paid $ 20 per month, that the town clerk position is also part-time involving only four hours per day with a payment of $ 6 an hour for said work, and that the chief of police/maintenance position is a salaried position, paid at the rate of $ 1200 per month.
>
> [R]egarding the assets of the Village of Sun, only three actual assets exist. The first is the water system, regarding which the Village does not own 'free and clear.' The second asset is the Village's Town Hall, which was donated by a private citizen, with the provision that if it ever ceased to be used as a town hall, that the property would revert back of the heirs of the donors. The third asset is a small building used as a senior citizens center, which was purchased just last year for less than $ 25,000.00 . . . .
>
> Ricky Hawthorne is not, and never has been, an employee of the Village of Sun.

Affidavit of Nathan T. Wood, Mayor, Village of Sun, March 10, 1995.

Defendant Sun's position is that, pursuant to the Supreme Court's decision in *Monell v. The Department of Social Services of the City of New York,* 463 658, 98 S.Ct. 2018 (1978, a local government unit the size of Sun is not considered a municipality for purposes of liability under 42 U.S.C. § 1983. In *Monell,* the Supreme Court examined the question whether municipalities, like other local governmen-

al entities, were wholly immune from suit under the Eleventh Amendment. They noted that the court held in *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473 (1961), that "municipal corporations" were not persons within the meaning of 42 U.S.C. § 1983. The *Monell* court exhaustively re-examined the rationale of *Monroe,* and overruled it, discerning no Congressional intent to exclude municipalities from liability under § 1983 and further finding that municipal corporations, like other corporations, are considered as natural persons "for virtually all purposes of constitutional and statutory analysis." *Monroe,* 98 S.Ct. at 2034-2035.

In announcing that municipalities and other local government units were included among those persons to whom § 1983 applies, the *Monell* court noted that:

> There is certainly no constitutional impediment to municipal liability. The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.' [citations omitted]. For this reason, *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465 (1976), is irrelevant to our consideration of this case. Nor is there any basis for concluding that the Eleventh Amendment is a bar to municipal liability. [citations omitted]. *Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes.*

Monell, 98 S.Ct. at 2018, n. 54 (emphasis added).

The premise of Sun's argument is that as a village, it is so small as to be a local government unit which is part of the State for Eleventh Amendment purposes which is described in footnote 54 of the *Monell* decision, and thus, even though it is unquestionably a municipality, this Court is barred by the Eleventh Amendment from entertaining jurisdiction over it. In support of this position, Sun contends that its small size, coupled with its lack of financial resources, remove it from the purview of the *Monell* decision. This is so, Sun argues, because if a judgment were rendered and enforced against Sun, it would obliterate all financial assets of the Village and the state would be forced to fund any judgment rendered against Sun.

Sun then refers to *Mitchell v. Los Angeles Community College District,* 861 F.2d 198 (9th Cir. 1988), *cert. denied,* 109 S.Ct. 2102 (1989), which lists the factors which are considered when determining "whether a governmental *agency* is an arm of the state" for purposes of the Eleventh Amendment. Those factors are:

> whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. [citation omitted] To determine these factors, the court looks to the way state law treats the entity.

Mitchell, 861 F.2d at 201.

Despite the fact that the *Mitchell* case is inapposite as it states clearly that these are the factors used to determine whether a "governmental agency", not a municipal corporation, is an arm of the state, a brief review of these factors applied to villages, or towns or cities for that matter, lead to the conclusion that municipalities would not be considered arms of the state. Certainly villages perform central governmental functions, that is, provide police protection and levy and collect taxes. LSA-R.S. 33:361. A village, like other municipalities, has the general power to make contracts. *First Sewerage District of the City of Lake Charles v. City Council of Lake Charles,* 215 La. 428, 40 So. 2d 808 (1949). It may sue and be sued, *Jobe v. Hodge,* 253 La. 483, 218 So. 2d 566 (1969), and own property in its own name. *New Orleans, M & C.R. Co. v. City of New Orleans,* 26 La. Ann. 478 (1874). It is a corporation created by the state. *Johnson v. City of Natchitoches,* 14 La. App. 40, 129 So. 433 (1930).

Further, it is mere conjecture on Sun's part to assume that should a judgment be rendered against it in an amount exceeding its financial ability to pay, the state would be forced to pay the judgment. A judgment against a municipal corporation cannot be enforced by execution against its property owned for public use. *City of New Orleans v. Ruleff,* 23 La. Ann. 708 (1971); *American-La France & Foamite Industries v. Town of Winnfield,* 184 La. 1043, 168 So. 293 (1936). Sun's contention that the state would or even could ultimately be forced to pay a judgment against the village of Sun, a municipal corporation, is not, so far as the Court can discern, supported by legal authority.

After a careful reading of the authorities cited by both parties, it seems clear that Sun has confused municipalities

with other types of local government units, particularly governmental agencies or boards, in analyzing this issue. *Monell* very specifically limits its holdings to municipalities or municipal corporations, noting that municipal corporations, like other corporations created under the laws of the states, are "deemed to all intents and purposes as a . . . person, although an artificial persons, . . . capable of being treated as a citizen of that state, as much as a natural person." *Monell*, 98 S.Ct. at 2034, *quoting Louisville R. Co. v. Letson*, 2 How. 497, 558, 11 L.Ed. 353 (1844). There is not a single word in the *Monell* opinion which convinces this court that the size of a municipality or its financial status are relevant considerations to determine whether it is a "person" for purposes of liability under the civil rights statute. The Court rejects Sun's argument that it, as a village, is immune from suit under the Eleventh Amendment.

Sun next argues that it is entitled to summary judgment in its favor because there is no evidence that a municipal employee committed a constitutional violation. *City of Los Angeles v. Heller*, 106 S.Ct. 1571 (1986). Thus, the Court must consider whether Chief Smith has demonstrated that he is entitled to summary judgment in its favor and whether Sun has demonstrated that Ricky Hawthorne is not a municipal employee. As to the second issue, it is plain that Sun has indeed demonstrated that Hawthorne is not a municipal employee. Sun's mayor testified by affidavit that Hawthorne is not, was not, and never has been a municipal employee. Plaintiff attached no affidavits, deposition excerpts, answers to discovery, or written evidence to counter that statement. Sun can therefore not be held liable for any

action committed by Ricky Hawthorne.[1]

Plaintiff's claim against Chief Smith is one of omission. Ritter argues that Smith failed to prevent the beating. The Seventh Circuit in *Yang v. Hardin*, 37 F.3d 285 (7th Cir. 1994), summarized the requirements of proof for a civil rights plaintiff against a defendant seeking to impose liability based upon an omission, as follows:

> An officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under sec. 1983 if that officer had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official, *and* the officer had a realistic opportunity to prevent the harm from occurring.

Yang, 37 F.3d at 285.

Pretermitting the first two questions, Chief Smith argues that he did not have a realistic opportunity to prevent the harm from occurring because he was in a police vehicle when Hawthorne struck Ritter, the vehicle was parked against a fence, and the entire incident took place so quickly he could not have prevented it. Neither party has supplied the Court with any affidavits, deposition excerpts, or discovery responses which would enable a decision to be made whether there is a disputed issue of fact in this regard. Since

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[1] Since Hawthorne was not acting under the color of authority of any state or municipality, plaintiff's sole claim against him arises under state law.

the party moving for summary judgment has the burden of establishing that he is entitled to it, the Court must find that Chief Smith, and the Village of Sun, have not demonstrated that there are no material issues of fact in dispute and that they are entitled to summary judgment on this issue.

Defendant argues extensively about the heightened pleading requirement in *Elliot v. Perez,* 751 F.2d 1472 (5th Cir. 1985). Accepting plaintiff's pleadings, which allege basically that the Chief of Police of the Village of Sun allowed one man to severely beat another for an extended period in his presence, without any cause whatsoever, and that the police officer failed to take any steps to prevent or stop this beating, the Court finds that such pleadings meet *Elliot*'s requirements and survive dismissal on their face.

Finally, defendant Chief Smith argues that he is entitled to the defense of qualified immunity, which applies to claims of excessive force. *Brown v. Glossip.* 878 F.2d 871, 873-874 (5th Cir.1989). Because of a lack of factual support, by way of discovery responses, deposition excerpts, or affidavits, the Court cannot find as a matter of law that there are no material facts in dispute and that the defendant is entitled to qualified immunity. When moving for summary judgment, it is defendant's burden to come forward with proof that he is entitled to judgment; once the defendant establishes his entitlement, it is only then that the burden shifts to the plaintiff to demonstrate disputed issues of fact which preclude summary judgment. Rule 56, Federal Rules of Civil Procedure.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motions of the Village of Sun and Roger Smith, Chief of Police, be and are hereby **DENIED.**

New Orleans, Louisiana, this 16 day of June, 1995.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge